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9 UNITED STATES DISTRICT COURT
10 SOUTHERN DISTRICT OF CALIFORNIA

11 UNITED STATES OF AMERICA)	Criminal Case No. 08cr1602DMS
)	
12 Plaintiff,)	Date: July 21, 2008
)	Time: 11 a.m.
13 v.)	
)	GOVERNMENT'S TRIAL
14 MICHAEL DOUGLAS MOORE,)	MEMORANDUM
)	
15 Defendant)	
_____)	

16

17 COMES NOW the plaintiff, United States of America, by and through
18 its counsel, Karen P. Hewitt, United States Attorney, Caleb E. Mason,
19 Assistant United States Attorney, and Paul S. Cook, Assistant United
20 States Attorney, respectfully submits the following Trial Memorandum.

21 **I**

22 **STATEMENT OF THE CASE**

23 **A. CHARGES**

24 On May 15, 2008, defendant Michael Douglas Moore ("Defendant")
25 executed a waiver of indictment, and was charged by Information with
26 one count of importation of marijuana in violation of 21 U.S.C.
27 sections 952 and 960. On July 17, 2008, a federal grand jury in the
28 Southern District of California returned a two-count Indictment
charging Defendant with: (i) importing approximately 51.03 kilograms

1 (112.26 pounds) of marijuana into the United States in violation of
2 21 U.S.C. sections 952 and 960; and (ii) possessing approximately
3 51.03 kilograms (112.26 pounds) of marijuana with intent to distribute
4 in violation of 21 U.S.C. Section 841(a)(1). Defendant is scheduled
5 to be arraigned on the indictment on July 18, 2008.

6 **B. TRIAL STATUS**

7 Trial is scheduled for Monday, July 21, 2008, at 11:00 a.m.
8 before the Honorable Judge Dana M. Sabraw. The United States
9 anticipates that its case-in-chief will last two days. The court has
10 set a motion hearing, in the alternative, for August 24, 2008. The
11 defense has not yet filed any motions.

12 **C. STATUS OF COUNSEL**

13 Defendant is represented by John Ellis, Esq., Federal Defenders
14 of San Diego, Inc., appointed counsel.

15 **D. CUSTODY STATUS**

16 Defendant is not in custody. On April 21, 2008, he was released
17 on a \$10,000 bond, secured by his own signature, by order of United
18 States Magistrate Judge Peter C. Lewis.

19 **E. INTERPRETER**

20 The United States does not need an interpreter for any of its
21 witnesses.

22 **F. JURY WAIVER**

23 Defendant has not waived trial by jury.

24 **G. PRE-TRIAL MOTIONS**

25 No motions have been filed.

26 **H. STIPULATIONS**

27 The parties have not yet entered into any stipulations in this
28 case.

1 Defendant was advised of his Miranda rights and waived them. He
2 made a statement which was witnessed by Special Agents Enrique
3 Torregrosa and Lance Swanson of Immigration and Customs Enforcement
4 (ICE). The statement was not recorded because recording devices were
5 temporarily unavailable at the Andrade POE due to ongoing remodeling
6 and construction.

7 Defendant stated that he lived in Downey, California, and that
8 a recent back injury prevented him from working. His next-door
9 neighbor, one Jorge, told him about an opportunity to make \$3000
10 driving a load of marijuana from Andrade to Downey. He accompanied
11 Jorge to Mexicali in Jorge's vehicle, where he was introduced to one
12 "Cooper" or "Cuba," who was the supplier of the marijuana.

13 Cooper supplied the load vehicle, the 1995 Pathfinder. Defendant
14 observed him driving it when he and Jorge arrived at Cooper's house.
15 Cooper and Jorge took the vehicle from the house and brought it back
16 freshly washed and with new tires. Defendant noticed the new tires
17 because they were racing tires, as opposed the stock tires that had
18 been on the Pathfinder when he had previously observed it. Cooper
19 told Defendant that he wanted him to cross the marijuana into the
20 United States, and wanted him to bring a female passenger with him as
21 a decoy. Defendant refused to take the passenger.

22 Defendant agreed to cross the vehicle for \$3000. His
23 instructions were to drive to Downey and then call Jorge, who would
24 pay him. Jorge crossed directly ahead of Defendant at the POE.
25 Defendant knew the contraband was in the tires because the vehicle
26 handled poorly when he drove it.

27 After Defendant's interview was completed, the ICE agents
28 obtained a portable recording device. While Defendant was being

1 transported from the POE to the Imperial County Jail, he made a series
2 of statements that were recorded by ICE Special Agent Lance Swanson.
3 Agent Swanson re-Mirandized Defendant before asking him any questions.
4 Defendant reiterated that he understood his rights and wanted to
5 cooperate. In the statement, he reiterated that he had come Mexicali,
6 with his neighbor Jorge, to make \$3000 driving a load of marijuana to
7 Downey, CA. He reiterated that he knew there was marijuana in the
8 vehicle both because he had agreed to drive a load of marijuana and
9 because the vehicle was very difficult to drive due to the contraband
10 in the tires.

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12 **C. DEFENDANT'S CRIMINAL HISTORY**

13 Defendant does not have any convictions of which the United
14 States is aware.

15
16 **III**

17 **WITNESSES**

18 The Government reserves the right to add, omit, substitute or
19 change the order of witnesses. Presently, the Government intends to
20 call the following witnesses during its case-in-chief:

- 21 1. Customs and Border Protection Officer James Williams
- 22 2. Customs and Border Protection Officer Michael Medley
- 23 3. Immigration and Customs Enforcement Special Agent Enrique
24 Torregrosa
- 25 4. Immigration and Customs Enforcement Special Agent Lance
26 Swanson
- 27 5. Immigration and Customs Enforcement Special Agent Vincent
28 McDonald (value expert)

6. Ramona Sanderson, DEA Forensic Chemist

IV

EXHIBIT LIST

The Government will provide a final exhibit list on the morning of trial. Presently, the Government intends to offer into evidence the following:

1. Photographs of Port of Entry
2. Photographs of Vehicle
3. Value Chart (Demonstrative Purposes Only)
4. Custody Receipt for Seized Property or Evidence
5. DEA-7 Form
6. Photographs of the marijuana recovered from the vehicle
7. The actual marijuana recovered from the vehicle

V

PERTINENT LAW

A. ELEMENTS OF THE CHARGED OFFENSES

1. Title 21, United States Code Sections 952 & 960

The elements for the offense of importing Marijuana are:

- a. Defendant intentionally brought marijuana into the United States; and
- b. Defendant knew that it was marijuana or some other prohibited drug.

9th Cir. Crim. Jury Instruction 9.27 (2003).

2. Title 21, United States Code, Section 841(a)(1)

The elements of the offense of possessing marijuana with the intent to distribute are:

- a. Defendant knowingly possessed marijuana or some other prohibited drug in a measurable or detectable amount; and

1 b. Defendant possessed marijuana with the intent to
2 deliver it to another person.

3 It does not matter whether a defendant knew that the substance
4 was marijuana. It is sufficient that a defendant knew that it was
5 some kind of prohibited drug. See 9th Cir. Crim. Jury Instruction
6 9.13 (2003). With regard to possession, the United States notes that
7 possession may be actual or constructive, and it may be proved by
8 direct or circumstantial evidence. See United States v. Magallon-
9 Jimenez, 219 F.3d 1109, 1112-1113 (9th Cir. 2000). Moreover, a
10 defendant's mere possession of a substantial quantity of a controlled
11 substance may show that the defendant knowingly possessed the
12 substance. See United States v. Diaz Cardenas, 351 F.3d 404, 407 (9th
13 Cir. 2003) (holding that jury could infer knowledge when an individual
14 is the driver and sole occupant of a vehicle containing 9.48 pounds
15 of methamphetamine (4.31 kilograms) and 17.65 pounds of cocaine (8.02
16 kilograms) concealed in the air bag of the vehicle); United States v.
17 Sanchez-Lopez, 879 F.2d 541, 555 (9th Cir. 1989) (finding 2.5
18 kilograms of cocaine sufficient to show knowledge and intent to
19 distribute and noting that a secret compartment within a vehicle used
20 to conceal illegal substances can raise an inference concerning
21 knowledge of the substance).

22 Knowledge may also be proved by reasonable inferences from the
23 high street value of the narcotics. See United States v. Ogbuehi, 18
24 F.3d 807, 812 (9th Cir. 1994) ("DEA agents can testify as to the
25 street value of narcotics, . . . and counsel can argue reasonable
26 inferences from it") (citation omitted); United States v. Golden, 532
27 F.2d 1244, 1247 (9th Cir.1976) (holding that "value of the heroin
28 found in the bags was relevant to both appellants' knowledge of the

1 presence of the heroin and intent to distribute"); Gaylor v. United
2 States, 426 F.2d 233, 235 (9th Cir. 1970) (testimony as to the selling
3 price of cocaine was relevant to issue of knowledge, since it tended
4 to refute "the possibility that a stranger could have placed such a
5 valuable cargo in a vehicle in the hope that the vehicle could be
6 followed and the cocaine later recovered in the United States").

7 With regard to distribution/delivery, the United States may prove
8 the "intent to deliver" element based on the following: a large
9 quantity of contraband (United States v. Diaz Cardenas, 351 F.3d at
10 407); the manner in which the controlled substance was packaged
11 (United States v. Glenn, 667 F.2d 1269, 1292 (9th Cir. 1982)); and the
12 street value of the narcotics (United States v. Davila-Escovedo, 36
13 F.3d 840, 843 (9th Cir. 1994)); United States v. Savinovich, 845 F.2d
14 834, 838 (9th Cir. 1988) (evidence of \$100,000 street value of
15 cocaine was relevant to proving defendant's intent to distribute);
16 United States v. Ramirez-Rodriguez, 552 F.2d 883, 885 (9th Cir. 1977)
17 (evidence of resale value of drug probative of intent to distribute).

18 **B. THE COURT SHOULD PERMIT UNITED STATES' EXPERT TESTIMONY**

19 If specialized knowledge will assist the trier-of-fact in
20 understanding the evidence or determining a fact in issue, a qualified
21 expert witness may provide opinion testimony on the issue in question.
22 Fed. R. Evid. 702. The trial court has broad discretion to admit
23 expert testimony. See e.g., United States v. Alonso, 48 F.3d 1536,
24 1539 (9th Cir. 1995). An expert may base his opinion on hearsay or
25 facts not in evidence where the facts or data relied upon are of the
26 type reasonably relied upon by experts in the field. Fed. R. Evid.
27 703. In addition, an expert may provide opinion testimony even if it
28

embraces an ultimate issue to be decided by the trier-of-fact. Fed. R. Evid. 704.

1. Value of the Marijuana and Distributable Quantity

The United States expects to present the testimony of an agent who will testify as an expert regarding the wholesale and street dollar value of the marijuana seized from the vehicle driven by Defendant. The expert will testify that the quantity of contraband seized from Defendant was far greater than a consumer would possess for personal use. The value testimony will focus on the wholesale and street values of the contraband, figures which have relevance to Defendant's intent to distribute. See Davila-Escovedo, 36 F.3d at 843 ("A jury may infer intent to distribute from the quantity and value of the drug possessed"). The Ninth Circuit has upheld the admissibility of expert testimony as to the wholesale and retail value of drugs. See United States v. Mendoza-Paz, 286 F.3d 1104, 1112-1113 (9th Cir. 2002).

It is expected that the expert will base his opinions on his experience investigating these types of cases, as well as his hands-on experience interrogating drug traffickers, debriefing confidential informants and discussing intelligence information with other agents. The United States has already provided defense counsel with notice of its intent to call a value expert. Consistent with the requirements of Fed. R. Crim. P. 16, the United States has provided Defendant with the name of its expert and a summary of the projected nature and scope of, as well as the basis for, this expert's testimony in anticipation of trial. The United States has also forwarded a copy of the expert's résumé. Accordingly, no basis exists for excluding the United States'

1 expert testimony regarding the value of the contraband and that the
2 amount found in the vehicle was a distributable quantity.

3 **2. Structure Evidence**

4 The United States does not intend to introduce expert testimony
5 regarding structure in its case-in-chief. If the United States
6 intends to present such evidence in rebuttal, it will do so consistent
7 with United States v. Vallejo, 237 F.3d 1008, *as amended*, 246 F.3d
8 1150 (9th Cir. 2001) and United States v. Valencia-Amezcua, 278 F.3d
9 901, 909 (9th Cir. 2002). See also United States v. Pineda-Torres,
10 287 F.3d 860, 866 (9th Cir. 2002) ("We have held that limited drug
11 structure testimony is admissible in drug importation cases when the
12 defense opens the door. . .")

13 **3. Blind Mule Testimony**

14 The United States may, however, elicit testimony that drug
15 traffickers generally do not entrust large quantities of drugs to
16 unknowing couriers or "blind mules." See United States v. Murillo,
17 255 F.3d 1169, 1176-77 (9th Cir. 2001) (unknowing drug courier
18 testimony admissible in drug possession case to attack defendant's
19 defense that he was "simply an unknowing courier"), *overruled in part*
20 *on other grounds by* United States v. Mendez, 476 F.3d 1077, 1080 (9th
21 Cir. 2007); United States v. Campos, 217 F.3d 707, 712 (9th Cir.
22 2000) (unknowing drug courier testimony was admissible in an
23 importation case). Expert testimony that drug traffickers do not
24 entrust large quantities of drugs to unknowing transporters is not
25 drug courier profile testimony. See United States v. Cordoba, 104
26 F.3d 225, 230 (9th Cir. 1997).

27 **4. The Substance Seized Was Marijuana**

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1 Absent a stipulation, the United States intends to introduce the
2 testimony of DEA Chemist Ramona Sanderson. It is expected that this
3 chemist will testify that she performed various tests on the substance
4 seized from the vehicle driven by Defendant. The chemist will
5 testify, inter alia, that the results of these tests indicated the
6 presence of marijuana. This chemist will base any expert opinions on
7 her background, education, and experience, along with her knowledge
8 and use of the accepted scientific methods used when testing unknown
9 substances for the presence of controlled substances.

10 Consistent with Fed. R. Crim. P. 16, the United States has
11 provided Defendant with the name of its DEA Chemist expert and a
12 summary of the projected nature and scope of, as well as the bases
13 for, this expert's testimony. The United States has forwarded a copy
14 of the expert's resumé. Accordingly, no basis exists for excluding
15 the United States' expert testimony that the substance seized from the
16 vehicle was, in fact, marijuana.

17 VI

18 PROPOSED VOIR DIRE

- 19 1. The Court will instruct you about the law. Will you follow
20 the law as given by the Court and disregard any idea or
notion you have about what the law is or should be?
- 21 2. The Government will be calling witnesses employed by the
22 Department of Homeland Security, Customs and Border
23 Protection and Immigration and Customs Enforcement. Does
24 anyone have family members or close friends who work, or
25 have worked, for these agencies? Would that prevent you
26 from being fair and impartial? Does anyone have any
27 negative views of these agencies that would prevent you
28 from being fair and impartial?
- 3 Has anyone had an unpleasant or negative experience with
any law enforcement personnel? Would that cause you to be
biased against law enforcement?
- 4 Has anyone ever had any disputes with any agency of the
United States Government? If so, please describe.

- 1 5. Have you or any relatives or close friends ever been
2 accused of, or charged with, a similar crime?
- 3 6. Has anyone had any training in the law? If so, please
4 explain.
- 5 7. Will you be able to put aside any feeling of sympathy or
6 pity for the defendant when deciding the facts of this
7 case?
- 8 8. Does everybody understand that a defendant is entitled to
9 a fair trial? Does everybody understand that the United
10 States is also entitled to a fair trial?
- 11 9. Does anybody have any moral or religious reservations that
12 might prevent him/her from standing in judgment of other
13 human beings?
- 14 10. The defendant in this case is charged with importation of
15 marijuana. Does anybody have strong feelings or opinions
16 about U.S. narcotics laws that would prevent him/her from
17 viewing the evidence impartially?
- 18 11. The law requires the government to prove its case against
19 the defendant beyond a reasonable doubt. If you are
20 selected, would you want the government to prove its case
21 by a higher standard of proof, e.g. beyond any possible
22 doubt?
- 23 12. Certain events in this case took place at the Andrade Port
24 of Entry. Have any of you been sent to secondary
25 inspection or had your vehicle searched at the Andrade Port
26 or another port of entry? Have any of you had any strongly
27 positive or strongly negative experiences at the Andrade
28 Port or another port of entry? Do you believe this experience
might prevent you from viewing the evidence in this case
impartially?
13. Is anyone here involved in criminal defense work? Does
anyone have any friends or family members who are involved
in criminal defense work? Is anyone here involved in law
enforcement? Does anyone have any friends or family
members who are involved in law enforcement?
14. Regardless of any position you may have on the legalization
or criminalization of marijuana, if you become a juror in
this federal trial, will you be able to follow the
federal law of the United States as it presently stands and
as the judge instructs you regarding the criminal
importation and possession of marijuana?

VIII

JURY INSTRUCTIONS

1 The United States will submit proposed jury instructions under
2 separate cover. The United States reserves the right to submit
3 additional instructions at the Fed. R. Crim. P. 30 conference.

4 DATED: July 18, 2008.

5 Respectfully submitted,

6 KAREN P. HEWITT
7 United States Attorney

8 /s/ Caleb E. Mason
9 Caleb E. Mason
10 Assistant United States Attorney

11 /s/ Paul S. Cook
12 Assistant United States Attorney
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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF CALIFORNIA

3 UNITED STATES OF AMERICA) Criminal Case No. 08cr1602DMS
4)
5 Plaintiff,)
6)
7 v.)
8)
9 MICHAEL DOUGLAS MOORE,)
10)
11 Defendant.)
12)
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IT IS HEREBY CERTIFIED that:

I, Caleb E. Mason, am a citizen of the United States and am at least eighteen years of age. My business address is 880 Front Street, Room 6293, San Diego, California 92101-8893.

I am not a party to the above-entitled action. I have caused service of **GOVERNMENT'S TRIAL MEMORANDUM** on the following parties by electronically filing the foregoing with the Clerk of the District Court using its ECF System, which electronically notifies them.

1. John Ellis, Federal Defenders of San Diego, Inc.

I hereby certify that I have caused to be mailed the foregoing, by the United States Postal Service, to the following non-ECF participants on this case:

None

the last known address, at which place there is delivery service of mail from the United States Postal Service.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on July 18, 2008.

/s/ **Caleb E. Mason**
CALEB E. MASON